First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice

Appeal Reference: EA/2019/0161

Considered on the papers
On 5 August 2019

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

DAVE SIVERS & ANDREW WHETNALL

Between

THE LIBERAL DEMOCRATS

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

1. The appeal is dismissed.

REASONS

2. As part of a wider programme of assessment of compliance with the Data Protection Act 2018 the Information Commissioner (the Respondent in these

proceedings, the Commissioner) on 27 February 2019 served an Assessment Notice on the Liberal Democrats (the Appellant in these proceedings) under s146(1) of the Act requiring the Appellant *to permit the Commissioner to carry out an assessment of whether the controller or processor has complied or is complying with the data protection legislation*. The Notice required that organisation to give access to its premises and records during the period 10 -14 June 2019 to enable her to examine the processing of personal data. The purpose of this audit was:-

"to demonstrate to the Commissioner that the Liberal Democrats are complying with the data protection legislation, to highlight to the Liberal Democrats are areas of risk to their compliance and to make recommendations in areas that require improvement. Where necessary the Commissioner will take action to ensure that there is compliance with the data protection legislation."

3. In the following period routine contact between the Commissioner and The Appellant clarified arrangements relating to the audit. On 8 April 2019 The Government tabled an Order in Parliament confirming the date of the elections to the European Parliament as 23 May (subject to the UK not having left the EU prior to that date). The Appellant raised concerns about the impact of preparation for the audit on its election campaigning and asked *"please could you let me know the dates the other political parties will be audited?"*. In response on 17 April the Commissioner recognised the issue but stated *"the ICO feels however that the possibility of European Parliamentary elections have been part of the political calendar for some time and that, in issuing our Assessment Notices at the end of February, we gave all parties sufficient notice of our intent to conduct our audits during this time. The work we are undertaking as part of our programme of audits is crucial to our ongoing investigations into the political campaigning activities across the sector, as outlined in our report issued by the Information Commissioner in July last year. We do however appreciate the concerns you have raised in your request and, as a compromise, are willing to push back the deadline date for the provision of the pre audit documentation from 17 May to 31 May, which will give time following the elections to complete the work required."* A fresh Assessment Notice was issued on 26 April which set out the varied timetable.

4. On 2 May 2019 the Appellant appealed to the tribunal against the Assessment Notice. The notice of appeal argued unfairness and significant operational disruption.

5. It stated that *"we believe that we are the only political party who will be audited immediately after an election campaign period, with much of the preparatory work needing to be undertaken while we are at fever pitch levels of activity. We did ask the ICO for the dates that the other political parties will be audited, because we believe anecdotally that they are not being similarly disadvantaged, however the ICO chose not to provide us with an answer."*

6. The notice argued that with the local elections and then the European elections the Appellant would be at a serious operational disadvantage and the Appellant would face a difficult choice between fighting the elections and preparing for the audit. The Appellant requested the audit and the dates for the completion of the various preparatory steps be postponed for six weeks.

7. In resisting the Appeal by a response of 24 May the Commissioner confirmed that Assessment Notices had been issued to seven political parties, Labour, Conservative, Liberal Democrats, DUP, SNP, Plaid Cymru, UKIP, all these audits were scheduled between May and August. In the light of the announcement that the European elections were to take place the Commissioner had made adjustments to the timetables for the political parties with respect to the provision of pre-audit documents and of the audits,

   "The only dates she changed were those that overlapped with the election campaign itself. She did not change any dates that fell after the election.

   In relation to the Labour Party, for example, the Commissioner changed the date for pre-audit documents from 10 May to 24 May, which is the date after the election. The Commissioner did not change the date of the audit of the Labour Party, which is scheduled for 3-7 June 2019. The date for the Conservative Party to provide pre-audit documents is also 24 May 2019, its audit will then take place on 17-21 June 2019…."

8. The Commissioner confirmed that she had treated all parties consistently and fairly. The audits were of pressing public importance and a part of her investigation into the use of data analytics by political actors and the impact of such techniques on the political process. The investigations needed to be through and swift. She had recognised the potential for unfairness by changing those dates for parties which fell during the election period when the dates for other parties fell after the election, she had not changed subsequent dates to prevent a much greater disruption to the progress of the audits.

9. The Commissioner argued that against this framework the Appellant was not at an operational disadvantage compared with other political parties. Furthermore, the Appellant had had ample time to prepare for the audit having been no notice since 27 February – three months before the date set for the delivery of pre-audit documentation, with two and a half weeks between the election and the first day of the audit.

10. The Commissioner emphasised that she had discretion with respect to the conduct of audits, the inconvenience of an audit was not a reason to restrict her discretion, although she did exercise her discretion in favour of reasonable requests. She concluded:-

11. *"There may, however, be very good reasons for the Commissioner to conduct an audit at a time that is inconvenient for a data controller, as this may be the time at which a controller is less likely to comply with data protection legislation. For example, the*

Commissioner may reasonably conclude on this basis that an audit of a political party during a future election is appropriate. Consequently, the simple fact that an audit is inconvenient is not a reason for the Commissioner (or the Tribunal) to exercise the discretion differently".

12. On 13 June the Appellant responded explaining that it had chosen to appeal since it had been concerned that it might have been put at a disadvantage with respect to other political parties and had not received the detailed reassurance (in terms of the dates of audit for its competitors which it had sought). The Appellant confirmed its commitment to co-operating and suggested a period during which the audit could take place.

13. On 24 July the tribunal, having noted that the issue giving rise to the appeal, due to the passage of time, no longer existed issued directions to the parties "*that by 01 August the parties should discuss and agree a new date for the audit and notify the tribunal of that date*" and suggested that the proceedings had served their purpose." The parties confirmed the agreed dates for the audit and the Respondent asked for the tribunal to make a decision on the appeal.

Consideration

14. The Appellant has acknowledged that the reason it appealed was a desire not to be disadvantaged in the political competition and that if the specific information it had sought (the dates of the audits of the other political parties) had been given to it would not have appealed. The difficulty with that argument is that it was seeking confidential information about the Respondents actions towards third parties and the Respondent considered that it should not disclose the information. Rather the Respondent adjusted the dates of the audit to meet the Appellant's concerns. That was a proper and proportionate response to those concerns and should have been accepted by the Appellant.

15. The point made by the Respondent (paragraph 10 above) is apposite. The role of regulator is to identify and prevent breaches of the Act which fall under the supervision of the Commissioner. To this end different regulatory frameworks provide different mechanisms to enable the regulator to achieve this according to the perceived risks of each area. In competition law regulators sometimes use "dawn raids" to prevent the destruction of evidence of misconduct. The Bank of England, in seeking to ensure the stability of the financial system considers the ability of banks to withstand a modelled major recession and other hypothetical blows to solvency in what are termed "stress tests". If circumstances arose indicating questionable activities it could well be right for the Respondent to investigate the actions of one or more political parties during the period of an election when the risk of mishandling data is at its greatest.

16. It would be inappropriate, in respect of such hypothetical possibilities, for this Tribunal to fetter the Respondent's discretion in determining, in the light of her informed judgement, steps it considers appropriate to uphold the regulatory framework. Inconvenience is not a valid reason for delay. Resources are always likely to constrain the scope for concurrent audits of all parties. There is likely therefore to be a sequence which may not suit everybody. In this instance the Commissioner showed flexibility in responding to the late change in requirement for elections to the European Parliament. In those circumstances we find no fault or unfairness in the way the Commissioner's discretion was exercised. The appeal is therefore dismissed.

17. It may be noted that from the date of the original assessment notice to the date of the revised notice two months elapsed and that from the date of the appeal to the date fixed for consideration of this matter more than three months elapsed. In this period flexibility was demonstrated and a satisfactory outcome reached. In other circumstances, where an Appeal needed to be processed urgently, Rule 5 of the tribunal's rules would have permitted the shortening of some of the time periods which contributed to the three months hiatus.

Signed Chris Hughes

Judge of the First-tier Tribunal

Date: 15 August 2019
Date Promulgated: 16 August 2019